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## Appeal Decisions

Site visit made on 17 January 2017

**by Elizabeth Jones BSc (Hons) MCTP MRTPI**

**an Inspector appointed by the Secretary of State for Communities and Local Government**

**Decision date: 24 February 2017**

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**Appeal Ref A: APP/J1860/C/16/3159286**

**Appeal Ref B: APP/J1860/C/16/3159287**

**Land Lying to the South of Lane's End, Kempsey, Worcester WR5 3JH**

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mrs Helen Holmes (Appeal A) and Mr Peter Holmes (Appeal B) against an enforcement notice issued by Malvern Hills District Council.
- The enforcement notice, numbered E/16/00105/COU3, was issued on 22 August 2016.
- The breach of planning control as alleged in the notice is without planning permission, the unauthorised permanent siting of residential accommodation in the form of a shepherd's hut on the Land, and the associated unauthorised change of use of the Land from agriculture to mixed leisure and domestic garden.
- The requirements of the notice are:
  - i) Permanently remove the residential accommodation (in the form of the shepherd's hut) from the Land.
  - ii) Cease the use of the Land for leisure and domestic purposes, including the removal from the Land of any structures and paraphernalia associated with leisure or domestic use of the Land.
- The period for compliance with the requirements is one month.
- Appeal A is proceeding on the grounds set out in section 174(2) (a), (f) and (g) of the Town and Country Planning Act 1990 as amended.
- Appeal B is proceeding on the grounds set out in section 174(2) (f) and (g) of the Town and Country Planning Act 1990 as amended.

**Summary of Decisions: The appeals are dismissed and the enforcement notice upheld with a variation.**

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### Procedural Matter

1. The Council in their questionnaire indicate that the proposal would affect the setting of a listed building and have provided details of the listing for the Church of St Mary. However, the Council make no comment regarding any effect of the proposal on this heritage asset. Being mindful of my statutory duty in respect of the setting of this heritage asset, due to the distance between the application site and the heritage asset, I consider the proposal would not harm the setting of the Church of St Mary.
  2. The site lies within the Kempsey Conservation Area. The Council consider that the proposal would preserve the character and appearance of the Conservation Area. From all I have seen and read I have no reason to differ from this view.
  3. Planning history of the site includes a planning refusal Ref 15/00985/FUL for '*change of use of 0.2ha field to leisure use to site 2 mobile shepherds huts to be used as holiday accommodation*' (hereafter referred to as the 2015 application). I note the comments from both parties regarding the validity of
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this application. However, the validity of a planning application is a matter for the Council and does not influence my decision.

### **The Enforcement Notice**

4. The appellants consider that the appeal site area as indicated outlined in red on the plan attached to the enforcement notice is incorrect and that the site area should be a much smaller area as indicated in their submissions<sup>1</sup>. While there is a ranch style fence and gate that separates the shepherd's hut from the remainder of the Land (as defined in the notice), there is a shared access and parking area with the rest of the field. In the circumstances I consider that the appropriate planning unit is the whole of the field and so no correction to the notice is required. However, I shall consider whether the matter of the smaller area of the landholding as suggested by the appellant could be addressed by conditions.

### **Appeal A on ground (a)**

#### **Main Issues**

5. The main issues are i) the effect of the development on the character and appearance of the surrounding area and ii) the susceptibility of the development to flood risk.
6. The appeal site is a field adjacent to Lanes End in the open countryside to the south of the village of Kempsey and to the west of the River Severn. The shepherd's hut is located in an elevated position in the north east corner of the field on an area of hardstanding. It can be clearly seen from the public footpath which runs between the appeal site and the river. The Shepherd's hut is let as holiday accommodation.

#### *Character and appearance*

7. Policy 35 B. of the South Worcestershire Development Plan states that planning permission for visitor accommodation outside a development boundary will be permitted provided that it is of an appropriate type and scale for the location. Due to its form, light colour and materials the shepherd's hut appears incongruous in this prominent location and is out of keeping with the rural character and appearance of the area.
8. The appellant argues that the area was overgrown and has now been tidied up. Be that as it may, the shepherd's hut together with the associated paraphernalia introduces a greater domestic character to this area of land which has an urbanising effect upon this area of countryside altering its character to a harmful degree.
9. I therefore conclude that the shepherd's hut is harmful to the character and appearance of the area contrary to Policies SWDP 35 B. and SWDP 2 (A iii. and C.) of the South Worcestershire Development Plan (2016) (SWDP) which seek to ensure that development safeguards and (wherever possible) enhances the open countryside.

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<sup>1</sup> Appellants' Statement December 2016, page 2 Fig 1 'site location plan'

### *Flood Risk*

10. Policy SWDP 36 A.i. of the SWDP states proposals for new static and touring caravans, chalets and camping sites will be permitted where the site is not within the Flood Zones 2 or 3. Further, the National Planning Policy Framework (the Framework) advises that inappropriate development in areas at risk of flooding should be avoided. The determination of applications is advised so as to minimise flood risk by directing, amongst other actions, new development to areas with the lowest probability of flooding.
11. The appellant has not provided a copy of a Flood Risk Assessment (FRA), which is said to have accompanied the 2015 application, and so I cannot take it into account. Whilst the appellant argues that the north east corner of the appeal site, on which the shepherd's hut is sited, is "just outside" the 1:25 year flood zone<sup>2</sup>, in the absence of the FRA it is unclear why I should attach weight to a 1:25 flood zone. The Planning Practice Guidance (PPG) does not refer to such a zone but instead distinguishes between land having a 1 in 100 and 1 in 1,000 annual probability of river flooding. Land having a 1 in 100 or greater annual probability of river flooding is in Flood Zone 3a. The PPG classifies sites used for holiday or short-let caravans and camping as 'more vulnerable' to flood risk and should not be permitted in Flood Zone 3b.
12. The Environment Agency's (EA) flood maps are not sufficiently precise to show the exact boundary of areas at risk of flooding. Moreover, the maps do not differentiate between Flood Zone 3a, where there is a high probability of flooding, and Flood Zone 3b, the functional floodplain. Section 2 of the EA's representation in relation to this appeal unambiguously says that the development site is located entirely within Flood Zone 3 of the River Severn which is classified as a 'Main River'. Section 5 of the EA's representation concludes that the entire development is located within Flood Zone 3b. The EA is responsible for managing the risk of flooding from main rivers and, in this context, it is appropriate to attach significant weight to their advice.
13. In the circumstances, particularly in the absence of an FRA from the appellant, there is no basis to disagree with the EA's conclusion that more vulnerable development of this nature should not be permitted in this flood zone. In reaching this view I have taken account of the appellant's final comments but, whilst what is described as the upper area is said to be approximately 1.3 m higher, no levels survey is provided and the height has not been expressed as a height Above Ordnance Datum [AOD]. As such it is difficult to make a direct comparison to the EA's information on the modelled flood levels for the site. However, based on the EA's advice, because the appeal site lies entirely within the functional floodplain, Policy SWDP 28 states that development will not be permitted here.
14. Notwithstanding the finished floor level of the shepherd's hut, the evidence provided by the EA indicates that due to its location within the flood plain, the vehicular access to the appeal site is not safe for the occupants of the shepherd's hut in the event of a flood. I note that there is a pedestrian gate onto Lanes End. However, given its location I am not convinced it would provide a safe means of access due to the extent to which the flood plain extends along this lane. Thus, whilst I have taken account of the contents of

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<sup>2</sup> The appellants' Flood Warning and Evacuation Plan September 2016

the Flood Water Evacuation Plan, based on the evidence, I am not satisfied that the occupants of the shepherd's hut would be able to evacuate safely from the appeal site should flooding occur. Consequently, I consider that the deemed planning application is for an unacceptable form of development, which is contrary to the objectives of the Framework. Given the position of the EA it would not be appropriate to grant a conditional planning permission on the Land, even if it were restricted to the area edged red on Figure 1 to the appellant's statement.

15. I conclude that the use of the land for the siting of residential accommodation in the form of a shepherd's hut and the associated unauthorised change of use of the Land from agriculture to mixed leisure and domestic garden is unacceptable in terms of its flood risk. In this respect the scheme conflicts with Policies SWDP 28 and SWDP 36 (A.i) of the SWDP which seek to protect the functional floodplain and states that proposals for new sites will be permitted where the site is not within Flood Zones 2 or 3.

### **Other matters**

16. I note the Council's concerns that an ecological and habitat survey has not been submitted. However, as I am dismissing the appeal for other reasons my decision does not turn on this matter.
17. I have considered all the other matters raised by the appellant and others, including local residents and patrons of the site, in support of the appeal. In particular I acknowledge its contribution to the local community and its economy. I also note the appellant's costs in establishing the business, the ecological enhancements and the desire to develop an 'eco-tourism facility' which would provide employment. However none of these considerations lead me away from finding that the harm that I have identified in relation to the main issues means that the deemed planning application should be refused. There are no planning conditions that could be imposed to acceptably mitigate the identified harm.
18. The appellant considers that the wooden lodges and caravans at the nearby Seaborne Leisure site have set a precedent. I have not been provided with any details. Thus, I am unaware of the full circumstances associated with this site and do not know if they are directly comparable to the particular set of circumstances at the appeal site. In any event, each case must be determined on its own merits having regard to the Development Plan, the Framework and other material considerations.

### **Conclusion**

19. For the reasons given above, and having regard to all other matters raised, I conclude that Appeal A on ground (a) and the application for deemed planning permission fails.

### **Appeals A and B on ground (f)**

20. The ground of appeal is that the steps required by the notice to be taken or the activities required by the notice to cease, exceed what is necessary to achieve the purpose.

21. The appellants suggest that the steps should be revised to enable the shepherd's hut to remain on the land for use in connection with the agricultural use of the field.
22. It is not excessive to require the removal of all items introduced to facilitate the unauthorised use (whether or not they amounted to development in their own right and whether or not they could have been permitted development) as part of the notice. Leaving the shepherd's hut and any structure and paraphernalia associated with the unauthorised use would not achieve the purpose of the notice which is to remedy the breach of planning control by restoring the land to its condition before the breach took place. I therefore consider that the removal of all such items used in association with the unauthorised use is necessary and justified. The requirements do not preclude the appellants doing what they are lawfully entitled to do in the future once the notice has been complied with. I conclude that no lesser steps would remedy the breach of planning control and the appeal on ground (f) fails.

### **Appeals A and B on ground (g)**

23. Ground (g) is that the time given to comply with the requirements of the notice is too short. The appellants have requested 12-15 months, to allow for an alternative site to be found, purchased, existing bookings to be honoured and the business website updated accordingly, otherwise it is said the business will have to close.
24. It seems to me that a one month compliance period would give the appellants relatively little time to look for an alternative site. Given the harm it is causing the development should not be allowed to continue for any longer than is necessary. I consider that a fifteen month period for compliance would be unnecessarily long. Having regard to the submissions from both parties, I consider a period of six months would represent a more reasonable length of time which would strike the appropriate balance between the legitimate interests of enforcing planning control and the interests of the appellants. To that extent, the appeals on ground (g) succeed.

### **Formal Decision**

25. It is directed that the enforcement notice be varied by the deletion of the words "one calendar month" from paragraph 6 (Time for Compliance) of the notice and the substitution therefor of the words "6 months".
26. **Appeal A** - Subject to this variation the appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act as amended.
27. **Appeal B** - Subject to this variation the appeal is dismissed and the enforcement notice is upheld.

*Elizabeth Jones*

INSPECTOR